The crucial question, Tony Blair said in 1996, 'is: does the government regard people's involvement in politics as being restricted to periodic elections? Or, does it regard itself as in some sense in a genuine partnership with the people?' Freedom of information (FOI) was 'not some isolated constitutional reform', he added, but 'a change that is absolutely fundamental to how we see politics developing in this country over the next few years.'

In fact, the public waited considerably more than a few years after Labour came to power in 1997. But the United Kingdom finally has a Freedom of Information Act and early experience suggests it has had a significant impact. However, the Act remains fragile – it has already faced two serious political attacks and further challenges may be on the horizon.

The prospects of FOI ever reaching the statute book at all once seemed remote. The UK was left behind when a number of Commonwealth countries (Australia, Canada and New Zealand) passed FOI legislation in the early 1980s. Although not the first to adopt open-government laws – Sweden did so in 1766 – these countries, with their Westminster-style parliaments, were particularly significant to the UK. Their experience greatly undermined the argument that FOI was incompatible with the concepts of ministerial responsibility and civil service neutrality. By 1997 many other countries, including Ireland, had followed suit and freedom of information was rapidly becoming a global trend.

A decade on almost seventy countries had adopted FOI...
Most of these share a number of common features. They establish a right of access to information held by government, permitting information to be withheld only where specific exemptions apply. Under some laws, even exempt information may have to be disclosed if the balance of public interest favours openness. Furthermore, applicants who are dissatisfied with the result can complain to an independent body – usually an information commissioner, ombudsman, tribunal or court – with the power to order disclosure.

The rationale for such legislation has a number of separate strands. Left to themselves, governments naturally tend to use their control over information to their own advantage. They disclose that which shows them and their policies in a positive light and withhold information which suggests that mistakes may have been made, policies may have failed or commitments may have been broken, or which supports the arguments put forward by critics and opposition parties.

FOI helps offset this tendency. It promotes honesty in government by making it more difficult for public authorities to say they are doing one thing while doing something else. The knowledge that the public may be able to see documents on which decisions are based helps to deter malpractice and encourages politicians and officials to be more rigorous in their analysis, thereby improving the quality of decision-making. It makes meaningful public participation and informed discussion possible. And it strengthens the hand of individuals in their dealings with the state.

In the UK, FOI attracted widespread public support. A MORI opinion poll commissioned by the Joseph Rowntree Reform Trust in 1991 found that 77 per cent of the public wanted a Freedom of Information Act, which made it the most popular constitutional reform.¹ FOI was a core demand of the original Charter 88 and the main objective of the Campaign for Freedom of Information (CFOI), which was established in 1984.


¹ MORI State of the Nation poll, 1991.
It has also been an abiding Labour Party commitment. Uniquely, FOI featured in every Labour manifesto from 1974 to 1997. However, as successive political scandals – Ponting, Tidall, Spycatcher, Matrix Churchill, BSE, cash for questions – highlighted the dangers of secrecy in the public's mind, the commitment became more heartfelt and expressed with more urgency. In 1991, Labour's deputy leader and shadow home secretary, Roy Hattersley, said:

Anyone who looks at our detailed plans for a Freedom of Information Act must know that it is not only suitable for early enactment. It is ready for early enactment. If a Labour government was elected on Thursday I would be able to send the headings of a Bill to parliamentary draughtsman on the following day.*

The 1997 manifesto stated: 'Unnecessary secrecy in government leads to arrogance in government and defective policy decisions ... We are pledged to a Freedom of Information Act, leading to more open government.' There was therefore disappointment when FOI was left out of the government's first legislative programme. Instead a White Paper was promised for July 1997, but that too was delayed.

Nonetheless, when in December 1997 the government published its proposals they were a welcome surprise. Contrary to expectations, the White Paper, Your Right to Know, adopted a radical approach. Dr David Clark, the chancellor of the duchy of Lancaster and the Cabinet minister responsible for drawing up the proposals, described it as an 'all-singing, all-dancing White Paper'.† The respected Canadian Information Commissioner, John Grace, dedicated two pages of his annual report to the

† Chancellor of the Duchy of Lancaster, Your Right to Know: The Government's Proposals for a Freedom of Information Act (Cm 3818, 1997).
proposals, stating: 'Canada's once brave, state-of-the-art Access to Information Act is being left behind by Britain,' and adding that the UK's White Paper 'represents nothing other than a breathtaking transformation in the relationship between the government and the governed'.

In many areas the White Paper set the bar high. Its scope was wider than many overseas laws, both in terms of the bodies covered and in terms of the range of information to be made accessible. Most notably, the proposed FOI regime would extend beyond the public sector to the privatised utilities and to private bodies undertaking contracted-out public functions. The grounds for withholding information would be fewer than under the Open Government Code introduced by the Conservative government in 1994 and the test for determining when information should be withheld would be set in 'specific and demanding terms'.

Many FOI laws around the world allow information to be withheld if its disclosure would 'prejudice' or 'harm' specified interests such as defence or law enforcement. The White Paper proposed that the normal test should be 'substantial harm'. The option of giving ministers a final say over disclosure decisions was specifically rejected. The White Paper stated: 'We have considered this possibility, but decided against it, believing that a government veto would undermine the authority of the Information Commissioner and erode public confidence in the Act.'

But the praise that greeted the White Paper proved premature, as the government began to retreat. Clark tried to reassure sceptics that the White Paper was not only his view; it had 'the complete...
and utter endorsement of the government as a whole. * "Of course we will listen," he said. "But on the other hand we will need a lot of persuading to change it. This isn't something that is going to be watered down as we progress along the way." Yet press reports suggested that senior ministers and officials were challenging some of the White Paper's fundamental principles. As the struggle continued in a Cabinet committee, Clark lost his job in a reshuffle and responsibility for FOI was moved to the Home Office under Jack Straw.

These developments caused mounting unhappiness among Labour MPs. A parliamentary motion congratulating the government on its White Paper and expressing concern at any delay in bringing forward legislation was signed by 234 MPs, 188 of them Labour. However, their fears were confirmed when the government announced that a draft Bill would not be published until 1999.

The draft Bill itself represented a major weakening of the White Paper's proposals and attracted universal criticism. The Guardian's then political commentator, the late Hugo Young, reflected that:

"Two years in, power has finally suppressed the clearest ideal that Labour formed during its years of impotence. The Freedom of Information Bill marks its definitive transition from a party dedicated to changing the world, into a government determined its own world shall not be changed. The purpose of this reform, as canvassed in opposition, was to alter the balance of power between citizen and state ... The Bill now disgorged is a spectacular betrayal of any such idea."

The CFIOI pointed out that in many areas the draft Bill was weaker than the non-statutory Open Government Code.+

† Hugo Young, 'The final triumph of all the butchers and whisperers', Guardian, 25 May 1999.
In key areas the White Paper's commitments had been watered down. Its centerpiece - the 'substantial harm' test - was gone, replaced by a simple 'prejudice' test. The draft Bill permitted entire classes of information to be withheld without any test of harm at all. A blanket exemption covered all information relating to the development of government policy, including factual information and scientific advice. Crucial safety information could be kept secret. The binding public interest test promised in the White Paper had been replaced by a discretionary one, with no provision for requesters to challenge decisions about its use. Extraordinarily, public authorities could insist on knowing why the applicant wanted the information - and could restrict what they could do with it. New catch-all exemptions had been devised and a power for the Home Secretary to create new exemptions at short notice inserted.

However, in two areas the draft Bill adopted a more positive approach than the White Paper. Charges for information would be modest and the deliberate destruction or alteration of information would be an offence. But the time allowed for responding to a request was doubled to 40 working days - which would have made the UK's the slowest and most unresponsive FOI regime in the world.

Two parliamentary committees called for sweeping changes to be made. The House of Commons Public Administration Committee reported that the Bill's right of access 'is so hedged about with qualifications and exemptions that it will not cover a large amount of information which the public might want.' It concluded that 'a failure to make the draft Bill better, as we have proposed, would represent a missed opportunity of historic proportions.' A special House of Lords committee stated: 'To the extent that the draft Bill represents a move from an enforceable public right of access ... to discretionary disclosure ... it abandons the freedom of information principles expressed in the White Paper.'

† Ibid., paras. 160.
responded by making some welcome improvements, but serious defects remained when the Bill was later introduced to Parliament. Fortunately, many of these were subsequently corrected.

In the face of political pressure, ministers were forced to 'ease the grip ... at the centre of the Bill'. The government yielded the power to the Information Commissioner to order the disclosure of exempt information in the public interest, but proposed that ministers and local authorities would be able to veto any such order. However, Parliament obtained a number of important safeguards against the veto's use. First, it would only be available to a Cabinet minister or the attorney general, not junior ministers. Second, ministers promised that collective consultation between Cabinet colleagues would be required before a veto could be issued. Third, the government agreed to remove the power from local authorities. And finally, a copy of the veto would have to be laid before both Houses of Parliament.

Further amendments included a restructuring of the Bill's public interest test so that to withhold information, authorities had to show that the public interest in doing so outweighed the public interest in disclosure. A statutory duty for authorities to provide advice and assistance to applicants was finally accepted. The power to create additional exemptions by order was removed, plus a relatively minor improvement to the policy formulation exemption prevented 'statistical information' from being withheld once a decision had been taken.

Despite these concessions, the government suffered a series of rebellions. In the Commons, thirty-six Labour MPs voted against allowing the exemption for the formulation of government policy to apply to purely factual information. Nevertheless, when the

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† This undertaking given by ministers during the Bill's report stage in the House of Commons; it is not a statutory requirement. See Hansard, HC Deb, 4 April 2000, vol. 347, col. 922.
‡ Previously the test had been the other way round; that is, the public interest in disclosure had to outweigh the public interest in withholding the information before exempt information could be disclosed.
§ This provision remains in the final Act, though authorities are required to
Freedom of Information Act received royal assent on 30 November 2000, it was a marked improvement on the 1999 draft Bill. The Bill's most obstructive features had been removed, the powers of the Information Commissioner had been strengthened and a binding public interest test gave the Act real potential. However, those who had campaigned for the legislation for so long couldn't help but feel pessimistic about its prospects. We became more so when implementation was delayed.

The government's intention had been to phase in the right of access, starting between twelve and eighteen months after the Act's passage. However, in November 2001, this timetable was abandoned in favour of one which delayed the right of access for more than four years and brought it into force for all authorities at once on 1 January 2005. Press reports suggested that the Prime Minister himself had intervened in the decision.

Once again, the UK found itself bottom of the FOI league. No other country had required anything like four years to implement its legislation - twelve months was the norm. Whatever the official justification that was given, the delay sent a damaging signal about the government's commitment to the reform.

When the Act belatedly took effect in 2005, five new rights to information came into force at the same time. The Freedom of Information (Scotland) Act 2002 provided similar, though slightly stronger, rights to information held by the Scottish public authorities. The Environmental Information Regulations and Environmental Information (Scotland) Regulations, implementing a EU directive,* provided parallel rights of access to environmental information held by public authorities and some private bodies such as utilities. And amendments to the Data Protection Act 1998 strengthened people's rights to see personal information held about them by public authorities.

have regard to 'the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking'.

The FOI Act has now been in force for nearly four years and, though there are issues that need to be addressed, its impact has been far greater than anyone anticipated. In 2006, an inquiry by the Constitutional Affairs Committee into the first year's experience of the Act concluded that 'implementation of the FOI Act has already brought about the release of significant new information and that this information is being used in a constructive and positive way by a range of different individuals and organisations...This is a significant success.' Lord Falconer of Thoroton, then Lord Chancellor and secretary of state for constitutional affairs, described the Act as the 'single most significant act of any government, in improving transparency, accessibility and accountability. It is the platform for building an improved relationship between the citizen and the state - in which the public can have a greater stake in how they are governed.'

One reason for this is that the Act has been well used. Although no accurate figure exists for the total number of requests across the public sector, the Information Commissioner has estimated that between 100,000 and 130,000 requests were made in the first year. This represents the top end of expectations, based on overseas experience. Ministry of Justice statistics show that after an initial surge in the first quarter of 2005, the volume of requests

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2 Speech at 'Power, Politics and Democratic Renewal: Lessons from the UK and Canada', event organized by Unlock Democracy, Canadian high commission, 6 March 2007.
4 Research conducted by the Constitution Unit predicted that there would be 100,000 requests in the first year, rising to 200,000 after a settling-in period. See Robert Hazell, Dick Baxter, Meredith Cook and Lucinda Maer, Estimating the Likely Volumes, Sensitivity and Complexity of Casework for the Information Commissioner under the Freedom of Information Act 2000 and the Environmental Information Regulations (London: Constitution Unit, University College London, 2004), para. 5.14.
to central government has settled at around 8,000 a quarter. By contrast, only a few thousand requests a year were made under the Open Government Code.

The media have been quick to realise the Act's potential. Thousands of media stories based on disclosures under the Act have appeared, many revealing important new information for the first time. FOI requests have revealed that the government ignored its own scientists when they advised that the methodology of a study estimating 655,000 Iraqi civilians had died in the war was robust and should not be criticised; ministers approved the NHS Connecting for Health computer system despite reports showing that the project's costs exceeded the likely benefits; the NHS has saved millions of pounds by cutting the use of agency staff; seventy-four Metropolitan Police officers have kept their jobs despite being convicted of crimes, including twelve who disciplinary panels recommended should be sacked; the police have been instructed to let offenders off with a caution if they commit one of more than sixty types of crime; and De Montfort University changed the exam results of pharmacy students to reduce the failure rate, despite concerns from lecturers and external examiners.

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* See 1,000 FOI Stories from 2006 and 2007 (London: Campaign for Freedom of Information, 2008).
* See Owen Bennett-Jones, 'Iraqi deaths survey “was robust”', BBC News website, 26 March 2007.
* See 'Hospitals cut agency nurse costs', *BBC News* website, 30 May 2008.
* In 2006, FOI requests by the *Daily Mirror* revealed that seventy NHS trusts spent £100 million on agency doctors and nurses; see Matt Reper, 'An NHS little earner', *Daily Mirror*, 27 November 2006.
* See Alistair Foster, '74 Met officers have criminal record', *Evening Standard*, 10 April 2006.
* See Tony Haplin, 'The university that cut its pass mark to 21%', *Times*, 20 April 2006.
FOI has claimed its first scalps. The leader of the Scottish Conservative Party, David McLetchie, was forced to resign over improper taxi expense claims after the Scottish Information Commissioner ruled that the Scottish Parliament must disclose full details of travel expenses claimed by MSPs. Since the figures were disclosed, MSPs' expenses have fallen substantially after several years of year-on-year growth. FOI requests also played a part in the resignation of Ian Paisley Junior, a minister in the Northern Ireland Executive, revealing his links with and lobbying for a major property developer.

Media use has been crucial in raising public awareness of FOI rights and support for the Act. According to one survey, 60 per cent of the public were made aware of the Act through media exposure.\(^1\) The research also showed that the public is increasingly aware of the benefits of FOI. The percentage of people saying that access to information increased their confidence in public authorities rose from 51 per cent in 2004 to 81 per cent in 2007.\(^2\)

Those who believe that access to information increased their knowledge of what public authorities do reached 86 per cent in 2007, up from 54 per cent in 2004.

Another reason to be positive is the body of case law that has emerged from the Information Commissioner's Office and the Information Tribunal (which hears appeals against the commissioner's decisions). The tribunal, in particular, has adopted a robust approach on the disclosure of government policy advice. In the first appeal on this subject, involving minutes of the Department for Education and Skills' management board, the tribunal set out guiding principles. It ruled that the purpose of the exemption is to protect civil servants, not ministers, stating: 'Despite impressive evidence against this view, we were unable to discern the unfairness in exposing an elected politician, after the

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\(^1\) See 'Role of FOI legislation in minister's downfall', Belfast Telegraph, 19 February 2008.

\(^2\) See Report on Information Commissioner's Office Annual Track 2007: Individuals (Hull: SMIU, 2007), para. 4.3. The research involved 1,222 telephone interviews with a representative sample of the public.
event, to challenge for having rejected a possible policy option in favour of a policy which is alleged to have failed."

In other high-profile cases the tribunal has ordered the disclosure of an assessment prepared by the Department of Work and Pensions to help the Home Office develop a business case for the identity cards schemes; ordered the BBC to disclose minutes of the meeting at which its governors discussed their reaction to the Hutton report; required the disclosure of officials' advice to John Prescott, then deputy Prime Minister, on whether to grant planning permission for a controversial tower block in the Vauxhall area of London; ruled that the Office of Government Commerce should release the 'gateway reviews' used in assessing progress in the government's identity card programme;4 ordered the release of submissions made by government departments to the Export Credit Guarantee Department in connection with a proposed oil and gas extraction project off the island of Sakhalin, north of Japan; and required the Department for Business, Enterprise and Regulatory Reform to disclose minutes of meetings with the Confederation of British Industry. On the other hand, the tribunal has ruled that the public interest favours withholding submissions to the secretary of state for culture from officials and other ministers on the government's decision on the list of sporting events which should be protected under the Broadcasting Act 1996 from having television rights sold. However, even in its earliest days, the Act faced two serious political attacks. The first came in October 2006, when the government announced proposals to amend the FOI fees regulations5 to make it easier for authorities to refuse requests on

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† This decision was overturned by the High Court on the grounds that the tribunal breached parliamentary privilege by relying on a select committee's opinion in its findings. However, the court upheld the key elements of the tribunal's approach to policy formulation exemption and the public interest test.

cost grounds. The proposals would have allowed an additional 17,500 FOI requests each year to be refused, about 15 per cent of the total. The government sought to justify this on the grounds that a small proportion of requests imposed a significant burden. But a report commissioned by the government found that the costs of Act were comparatively modest – the total cost across the whole public sector was estimated to be £35.5 million annually, including the cost of the Information Commissioner and the Information Tribunal.

It was clear that the government wanted to introduce the new regulations quickly and without proper consultation. The CFOI highlighted the fact that a Department for Constitutional Affairs minister, Baroness Ashton of Upholland, had promised Parliament that the public would be consulted before any changes were made. This was widely reported in the press and picked up by political journalists and editors questioning the Prime Minister at a press lunch, prompting him to promise a public consultation.

A consultation document with new draft regulations was published in December 2006. There was no assessment of the nature of the requests that would be refused if the regulations were implemented, or the public benefit that would be lost as a result. However, the consultation document acknowledged that the proposals 'would have a greater effect' on journalists, MPs, campaign groups and researchers.

Fortunately, the government had underestimated the level of opposition the proposals would encounter. Virtually the whole of

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*See Independent Review of the Impact of the Freedom of Information Act: A Report Prepared for the Department of Constitutional Affairs (London: Frontier Economics, 2006). This is the sum of the volume reduction figures for central government and the wider public sector of the first two options shown in Table 3 on page 7 of the report. Page 1 of the report estimates that central government will receive 34,000 FOI requests annually and that the rest of the public sector will receive 87,000 requests, making a total of 121,000.

† Ibid. para. 2.7

‡ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 (Department of Constitutional Affairs, 2006).

§ Ibid., Partial Regulatory Impact Assessment, para. 41.
the national press published editorials or substantial comment pieces criticising the proposals. The Daily Mail declared: 'There is at least one legacy of which Tony Blair could be proud: his government's introduction of the Freedom of Information Act ... How sadly significant that even before he has left office it looks as if that reform is going to be utterly emasculated.' Press Gazette launched a 'Don't kill FOI' campaign which ran for several months, culminating in a petition to Downing Street signed by 1,200 editors and journalists. Many voluntary sector and campaigning groups also voiced their opposition, including Unlock Democracy.

In a parliamentary debate on the issue, the former Labour defence minister Don Touhig said: 'To change the rules that allow public authorities to refuse FOI requests on costs grounds would be mean spirited and certainly unworthy of my party, and of my government, of whom I am immensely proud.' The Conservative frontbench spokesman Henry Bellingham said:

A saving of roughly £12 million – just 4 per cent of the cost of the COI [Central Office of Information] – means I do not think we are talking about cost. Are we talking about abuse of the system? Manifestly we are not ... So, if we ask, 'Why change the system?', the answer is simple. Ministers want to curtail the flow of information.

The Information Commissioner questioned the practical implications of the proposals. He told the Constitutional Affairs Committee that the existing fees regime was working well and had 'all the advantages of being simple, clear and straightforward and not being a deterrent.' Of the government's proposals he later said: 'I fear that they will introduce new layers of procedural

* 'Stop this assault on the right to know', Daily Mail, 6 March 2007.
1 Hansard, 7 February 2007, vol. 456, col 295WH.
2 Ibid., cols 314WH–315WH.
and, indeed, bureaucratic complexity." The committee itself concluded: "We see no need to change the fees regulations."

Extraordinarily, a second attack on the Act was launched at virtually the same time. A private member's Bill, introduced by the Conservative MP David Maclean, sought to remove Parliament from the scope of the FOI Act altogether and create a new exemption for MPs' correspondence with public authorities.

The Bill was justified as a measure to protect constituents' privacy, but this was spurious. MPs' correspondence on behalf of individual constituents was already protected under at least two exemptions in the Act, a point acknowledged by Maclean himself. He told MPs: 'Clearly if one writes to a public authority and gives the personal details of a constituent ... that information should be protected. It should quite clearly be protected under the current Act. However, inadvertently someone may release it. This measure would remove that small problem.' The real effect of the Bill would have been to prevent disclosure of information about MPs' expenses and allow MPs to lobby public authorities in secret.

The Bill was partly prompted by the disclosure of more detailed information about MPs' expenses under the Act. The Information Tribunal had recently ruled in favour of a request by the Liberal Democrat MP Norman Baker for greater details about MPs' travel claims. The Commons already published the amount paid to each MP for travel, but the tribunal ruled that a breakdown of the figures by mode of transport should also be provided.

This was only one of many requests on the subject of MPs' expenditure. The tribunal has since ordered the Commons to disclose full details of how each MP spends their additional costs allowance (ACA). This is the allowance paid to reimburse MPs for the costs incurred when staying away from their main home.

† HC 991, para. 104.
‡ Freedom of Information (Amendment) Bill
§ Freedom of Information (Amendment) Bill Committee, 1st sitting, 7 February 2007, col. 7.
while performing their parliamentary duties. In its decision the tribunal commented:

The laxity of and lack of clarity in the rules for ACA is redolent of a culture very different from that which exists in the commercial sphere or in most other public sector organisations today ... In our judgment these features, coupled with the very limited nature of the checks, constitute a recipe for confusion, inconsistency and the risk of misuse. Seen in relation to the public interest that public money should be, and be seen to be, properly spent, the ACA system is deeply unsatisfactory, and the shortfall both in transparency and accountability is acute.*

The House of Commons lost an appeal against this decision at the High Court in May 2008. However, the decision has not been universally accepted and some MPs remain unhappy, feeling that the level of scrutiny required by FOI is an unwarranted intrusion into their private lives. But in the wake of the scandal involving Derek Conway MP, suspended from the Commons for misuse of public money in paying his son for work he appeared not to have done, public demands for greater transparency seem unlikely to go away.

The House of Commons approved the Maclean Bill in May 2007, despite efforts by an all-party group of MPs to try and block it. Although officially the government maintained that it was 'neutral' on the Bill, a key part was played by the Parliamentary Labour Party, which wrote to all Labour MPs, urging them to support it. It also had support from Henry Bellingham, who described it as 'a very modest, small Bill'.†

However, the Bill fell when no sponsor was found to take it forward in the House of Lords. A report by the Lords Constitution Committee concluded that the Bill did 'not meet the requirements of caution and proportionality in enacting legislation of

Unlocking Democracy 17/10/08 14:40 Page 240

constitutional importance." And The Governance of Britain, the Green Paper on constitutional renewal published in July 2007 after Gordon Brown became Prime Minister, finally ended speculation over where the government stood on the matter, stating: 'It is right that Parliament should be covered by the Act.'

Brown also intervened to stop the fees proposals. In a speech on liberty in October 2007, he announced that the government would drop the proposed changes to the FOI fees regulations. 'We do this because of the risk that such proposals might have placed unacceptable barriers between the people and public information. Public information does not belong to government, it belongs to the people on whose behalf government is conducted,' he said.

At the same time, the Prime Minister announced a consultation on extending the scope of the Act to private bodies with public functions and contractors providing some services on behalf of public authorities. At the time of writing, the Ministry of Justice has yet to publish a response to the consultation. In addition, Brown announced a review of the thirty-year rule governing the release of records in the National Archives. The review, chaired by Paul Dacre, editor of the Daily Mail and editor in chief of Associated Newspapers, will make recommendations to the Prime Minister and the Lord Chancellor late in 2008 or early in 2009.

These initiatives suggest that the immediate future for FOI may be brighter. Brown himself has expressed his commitment to the legislation. In his speech on liberty, he said: 'Freedom of information can be inconvenient, at times frustrating and indeed embarrassing for governments. But freedom of information is the right course because government belongs to the people, not the politicians.' And in the furore following the disclosure under

† Ministry of Justice, The Governance of Britain (Cm 7170, 2007), para. 140.
FOI of Treasury officials' advice on the abolition of pensions tax credit, a decision Brown took when he became Chancellor in 1997, he defended both his decision and the FOI Act. "First, we introduced the Freedom of Information Act 2000. Secondly, I support it. Thirdly, I support the release of the papers." 

But further challenges to the Act lie ahead. It has been clear for some time that ministers are uncomfortable with the line the Information Tribunal has been taking on access to policy advice. In May 2007, a leaked letter from Alistair Darling to Lord Falconer, then the Cabinet minister responsible for FOI, aired concerns that the FOI Act was putting 'good government' at risk. The letter referred to a 'discernible trend' of cases going against the government at the tribunal and raised the prospect of using the veto to annul adverse decisions in future or amending the Act. Either of these outcomes would represent a massive setback for the legislation.

Since the Darling letter, the government has challenged two tribunal decisions in the High Court. In both the court has upheld the tribunal's interpretation of the statutory provisions dealing with policy formulation and internal discussions. However, at the time of writing, the tribunal is about to hear the first case involving Cabinet minutes, following the Information Commissioner's ruling that minutes discussing the war in Iraq should be disclosed. This will be the next of what is likely to be a continuing series of critical hurdles for the legislation.

Delays are a more practical problem. In 2006 the Constitutional Affairs Committee reported: "There is evidence that delays are..."

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1The first case, Office of Government Commerce v. Information Commissioner & Anor [2008] EWHC 737 (Admin) (11 April 2008), involved the Section 35 exemption in the Act for the formulation of government policy. The tribunal's decision in this case was quashed on an unrelated point that the tribunal had breached parliamentary privilege. But the court upheld the key elements of the tribunal's approach to Section 35 and the public interest test. The second case, Export Credits Guarantee Department v. Friends of the Earth [2008] EWHC 638 (Admin) (17 March 2008), involved the exception for internal communications in Regulation 12(4)(c) of the Environmental Information Regulations.
occurring at all stages of the process and there have to date been no penalties for such delays. This problem has arisen from the Act's time limits or lack of them. The legislation requires requests to be dealt with 'promptly' and within twenty working days. However, when an authority is considering disclosing exempt information under the Act's public interest test, the time can be extended for a period that is 'reasonable in the circumstances'. Unsurprisingly, this provision is abused and requests are delayed, sometimes repeatedly. In 2007, departments of state extended the twenty-day deadline in almost 10 per cent of requests. Of the extensions, 21 per cent were for forty days or more.\(^1\)

The problem is confounded by the lack of a statutory time limit for internal reviews. Before applicants can appeal to the Information Commissioner, they must normally ask the authority to review its own decision. If authorities drag their heels at this stage, the commissioner has no power to compel them to do anything. The Information Commissioner has said that he will make greater use of his regulatory powers against recalcitrant public authorities, or where he becomes aware of a pattern of non-compliance. Since 2007, he has issued a number of non-binding practice recommendations, drawing attention to serious shortcomings by authorities. Both the National Offender Management Service and the Department of Health have received such recommendations, largely because of persistent delays in responding to requests. However, these may be of limited effect when the work of the Information Commissioner's Office (ICO) itself involves such serious delays.

At the beginning of June 2008, the ICO had a backlog of 1,363 complaints. Figures obtained by the CPOI under the FOI Act show that for the year to March 2008, the ICO took an average of 514 days to close a case with a formal decision notice. For cases closed without investigation, the figure was 246 days. The consequences of this are obvious.

These problems are partly down to resources. It has been clear

\(^1\) HC 991, para. 15.
for some time that the ICO is significantly underfunded. Its FOI responsibilities are funded by grant-in-aid from the Ministry of Justice. The ICO has been given additional funding from April 2008, but the commissioner has said that while this will allow him to recruit enough staff to meet current demand, it will not be enough to enable him to reduce the backlog in the coming year.

However, if the Act is to be effective, the ICO must provide a more expedient remedy for complainants. As for the legislation itself, the CFOI would like to see several amendments. The time limits need to be tightened to address the problem of requests being delayed. The Scottish Act has fixed time limits for decisions on the public interest test and for internal reviews and the legislation for the rest of the UK should be brought into line. Secondly, the ministerial veto casts a shadow over the legislation and should be removed. The Australian government has just taken such a step, announcing the abolition of conclusive certificates under the Australian FOI Act.

The UK Act has already proved of immense benefit to the public. However, much still needs to be done to ensure it becomes more deeply rooted in our society. The president of the Australian Law Reform Commission, Professor David Weisbrot, said recently: “It is critical to get the law right, of course—but even more importantly, we need to nurture a strong "pro-disclosure culture".” This is the task facing us in the next five years.

